

Message

From: Matsumoto, Kimi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=38D95BE36605427B8C0CC1A79B24209F-MATSUMO, KIMI]
Sent: 9/20/2018 4:16:20 PM
To: Marshall, Tom [marshall.tom@epa.gov]
Subject: RE: Grubbs 7(d) language to avoid and summary on net pens

Hi Tom –

Erin mentioned that Wade? has the ESA lead on WQS? Should I give him a call?

Thanks! Kimi

From: Marshall, Tom
Sent: Thursday, September 13, 2018 12:46 PM
To: Matsumoto, Kimi <Matsumoto.Kimi@epa.gov>
Subject: RE: Grubbs 7(d) language to avoid and summary on net pens

Will take a look and be sure Tod's in the loop, but your last sentence sure rings true (and loudly). Thanks tons for the share.

Ex. 5 AC/AWP/DP

Tom Marshall
Assistant General Counsel
Cross-Cutting Issues Law Office
Office of General Counsel
US EPA, Room 7340C WJCN
202.564.5549

From: Matsumoto, Kimi
Sent: Thursday, September 13, 2018 2:04 PM
To: Marshall, Tom <marshall.tom@epa.gov>
Subject: FW: Grubbs 7(d) language to avoid and summary on net pens

Deliberative/attorney work product/attorney-client privileged

Hi Tom,

Ex. 5 AC/DP

Thanks, Kimi

From: Sengco, Mario
Sent: Wednesday, August 22, 2018 7:52 AM
To: R8 WQS <R8_WQS@epa.gov>
Subject: FW: Grubbs 7(d) language to avoid and summary on net pens

Another follow up on the net-pens and ESA discussion.

Mario

From: Soo-Hoo, Mimi

Sent: Wednesday, August 22, 2018 8:28 AM

To: Gallagher, Kathryn <Gallagher.Kathryn@epa.gov>; Labiosa, Rochelle <labiosa.rochelle@epa.gov>; Abele, Ralph <abele.ralph@epa.gov>; Anson, Robie <anson.robie@epa.gov>; Pfeifer, David <pfeifer.david@epa.gov>; Fleck, Diane <Fleck.Diane@epa.gov>; Hemken, Meghan <Hemken.Meghan@epa.gov>; Nelson, Russell <nelson.russell@epa.gov>; Thompson, Brian <Thompson.Brian@epa.gov>; Bauer, Candice <bauer.candice@epa.gov>; Bergeron, Christine <bergeron.christine@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Anderson, Danielle <Anderson.Danielle@epa.gov>; Macchio, Lisa <Macchio.Lisa@epa.gov>; Lavaty, Ann <Lavaty.Ann@epa.gov>; Voorhees, Jeanne <voorhees.jeanne@epa.gov>; Bentley, Katherine <bentley.katherine@epa.gov>; Saucerman, Suesan <Saucerman.Suesan@epa.gov>; Gaylord, Brent <Gaylord.Brent@epa.gov>; Brundage, Jennifer <Brundage.Jennifer@epa.gov>; Pierce, Maggie <Pierce.Maggie@epa.gov>; Godfrey, Annie <Godfrey.Annie@epa.gov>; Hakowski, Denise <Hakowski.Denise@epa.gov>; Maurano, Stephen <Maurano.Stephen@epa.gov>; Hashimoto, Janet <Hashimoto.Janet@epa.gov>; Fonzi, Gina <Fonzi.Gina@epa.gov>; Jankowski, Mark <jankowski.mark@epa.gov>; Marko, Katharine <Marko.Katharine@epa.gov>; Poleck, Thomas <poleck.thomas@epa.gov>; Phillips, Jennifer <phillips.Jennifer@epa.gov>; Wojtenko, Izabela <Wojtenko.Izabela@epa.gov>; Justice, JamesR <Justice.JamesR@epa.gov>; Wirick, Holiday <wirick.holiday@epa.gov>; Beckwith, William <Beckwith.William@epa.gov>; Grafe, Cyndi <Grafe.Cyndi@epa.gov>; Guzzo, Lindsay <Guzzo.Lindsay@epa.gov>; Szelag, Matthew <Szelag.Matthew@epa.gov>; Tritt, Maja <Tritt.Maja@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>
Cc: Sena, Angela <Sena.Angela@epa.gov>; Wooster-Brown, Catherine <Wooster-Brown.Catherine@epa.gov>; Mayo, Kathleen <mayo.kathleen@epa.gov>; Sengco, Mario <Sengco.Mario@epa.gov>; Barr, Janine <barr.janine@epa.gov>; Fleisig, Erica <Fleisig.Erica@epa.gov>

Subject: Grubbs 7(d) language to avoid and summary on net pens

All,

Thanks for the productive ESA workgroup meeting yesterday. Two follow-up items to share:

- Please see the Word doc attachment for the redline strike-out calling out certain sentences in the Grubbs 7(d) memo that we're asking Regions to avoid in your approval letters and 7(d) memos to file.
- See below for a very helpful summary Mario Sengco put together describing some of the issues raised by the net pens case. Thank you for putting this together, Mario! Coordinators – your regional liaisons may separately reach out to you with this write-up:

On November 4, 2015, the Wild Fish Conservancy filed a complaint in the Western District of Washington, alleging that EPA has a duty to reinitiate ESA Section 7 consultation with the National Marine Fisheries Service, regarding EPA's prior approval of certain sediment management standards ("SMS") in Puget Sound. The Conservancy's claims relate to certain portions of the State of Washington's SMS that accommodate the operation of salmon "net pen" facilities in Puget Sound. The Conservancy alleges that there was an outbreak of infectious hematopoietic necrosis virus ("IHNV") among certain net pen complexes within Puget Sound and a 2017 net pen collapse, and that EPA and NMFS must respond to those events by reinitiating an ESA consultation that was previously concluded in 2011, regarding EPA's 2011 approval of the SMS.

The key issues in this case are:

- (1) Whether the completed approval of a water quality standard (in this case, a sediment management standard) gives rise to an *ongoing* obligation to reinitiate ESA consultation when there has been a material change of circumstances;
- (2) If so, whether there has been such a change of circumstances in this case;
- (3) Whether EPA had a duty to consult on the effects to listed species that might arise because of the operation of net pens (e.g. disease and collapse);

(4) Whether EPA had a duty to consult, in 2011, on approval of a standard that became the applicable standard in 1996 under the Alaska Rule.

In our court briefing, EPA argued that we did not have a duty to consult in 2011 because the approval was done in 1996 and already the applicable standard under the Alaska Rule. Further, EPA also argued that following its final agency (approval) action, there is no ongoing obligation to reinitiate ESA consultation. If circumstances change, the only recourse would be for EPA to do an Administrator Determination if new or revised standards are needed following the change in circumstances.

However, the district court judge dismissed EPA's arguments.

Ex. 5 AC/DP

Thanks,
Mimi

Mimi Soo-Hoo
Office of Science & Technology
Soo-Hoo.Mimi@epa.gov
(202) 566-1192

-----Original Appointment-----

From: Soo-Hoo, Mimi

Sent: Tuesday, June 19, 2018 3:34 PM

To: Gallagher, Kathryn; Labiosa, Rochelle; Abele, Ralph; Soo-Hoo, Mimi; Anson, Robie; Pfeifer, David; Fleck, Diane; Hemken, Meghan; Nelson, Russell; Thompson, Brian; Bauer, Candice; Bergeron, Christine; Buffo, Corey; Anderson, Danielle; Macchio, Lisa; Lavaty, Ann; Voorhees, Jeanne; Bentley, Katherine; Saucerman, Suesan; Gaylord, Brent; Brundage, Jennifer; Pierce, Maggie; Godfrey, Annie; Hakowski, Denise; Maurano, Stephen; Hashimoto, Janet; Fonzi, Gina; Jankowski, Mark; Marko, Katharine; Poleck, Thomas; Phillips, Jennifer; Wojtenko, Izabela; Justice, JamesR; Wirick, Holiday; Beckwith, William; Grafe, Cyndi; Guzzo, Lindsay; Szelag, Matthew; Tritt, Maja; Wade, Alexis

Cc: Sena, Angela; Wooster-Brown, Catherine; Kathleen Mayo; Sengco, Mario; Barr, Janine; Fleisig, Erica

Subject: ESA Workgroup Meeting

When: Tuesday, August 21, 2018 3:00 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: DCRoomWest6105ERockCreek/DC-EPA-West-OST

Meeting agenda and materials added

Conference phone number: 1-202-991-0477, Conference ID: **Ex. 5 AC/AWP/DP**

The agenda is provided below and on SharePoint. Materials for the SurveyMonkey results portion of the agenda are attached.

Agenda

I. Roll Call

II. Updates

a. OPP consultation on pesticides

b. Net pens litigation

III. SurveyMonkey voting results

a. Overview of spreadsheet (see attached)

b. Discussion

I. Sequencing and order of technical topics – are workgroup members amenable to HQ rearranging based on which steps flow logically from one topic to another?

II. Walkthrough of HECD effects assessment – conceptual overview or step by step walkthrough of completed BE that's received Service concurrence?

III. National joint training program – what are workgroup members envisioning for this agenda topic?

I. Round-robin

II. Reminders

a. Next meeting: Tuesday, October 16, 3-4pm ET

b. Action items

This is a bimonthly meeting to discuss ESA consultation. The purpose of this workgroup is to facilitate regular dialogue on ESA consultation issues that Regions are facing, and to keep workgroup members apprised of notable ESA-related activities and issues bubbling up at the national level that may influence our consultation policy or technical guidance for conducting effects assessments.

Agendas will be developed from topics suggested by you, the workgroup! We look forward to regional workgroup members leading the discussions. Do you have a technical or policy question you're grappling with that's influencing either how you're approaching a consultation or how you're designing your effects assessment for a BE? If so, please send them to us for consideration on an upcoming workgroup meeting! Mimi will send out calls for agenda topics prior to each meeting date so we that we can add them to the agenda and help prepare potential topic materials. We'll include round-robins to each meeting as time allows.

Meeting agendas and ESA consultation information can be found on the [ESA Consultation SharePoint page](#).